IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

DIANNA BERETTA, Plaintiff/Appellant, v. TUCSON TRAP & SKEET CLUB, an Arizona corporation; LEE BACHMAN and JANE DOE BACHMAN, individually and as husband and wife; MICHAEL L. BRAEGELMANN and JANE DOE BRAEGELMANN, individually and as husband and wife; DOUGLAS J. SIMS and JANE DOE SIMS, individually and as husband and wife; and WALTER K. KILTZ, JR., and JANE DOE KILTZ, JR., individually and as husband and wife, Defendants/Appellees.	)	2 CA-CV 2007-0009 DEPARTMENT B MEMORANDUM DECISION Not for Publication Rule 28, Rules of Civil Appellate Procedure

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. C2005-4768

Honorable John E. Davis, Judge

AFFIRMED

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E C K E R S T R O M, Presiding Judge.

¶1 Plaintiff/appellant Dianna Beretta appeals from the entry of summary judgment against her and in favor of Tucson Trap & Skeet Club and its officers and directors (collectively, "the Club") and from the denial of her motion for reconsideration or new trial. The trial court found Beretta had not presented evidence sufficient to show that she had accepted the Club's written offer of employment and therefore no grounds existed for Beretta's contract-based claims. On appeal, Beretta argues, *inter alia*, the trial court erred in granting summary judgment because she "presented sufficient questions of fact supporting her position that she had accepted the written employment contract from [the Club]" and because the Club's motion for summary judgment did not address all counts of the complaint. We affirm.

¶2 We view the evidence in the light most favorable to Beretta, the party against whom summary judgment was entered. *See Espinoza v. Schulenburg*, 212 Ariz. 215, ¶ 6, 129 P.3d 937, 938 (2006). Beretta first worked for the Club from 1980 to 1983 as a puller referee. The Club rehired her in 1994 as manager, a position she held until 1998. When

hired in 1994, Beretta had a written employment agreement with the Club. The parties amended the agreement at least twice during Beretta's tenure as manager to increase her pay and specify a period of employment. The employment agreement and both amendments were signed by both Beretta and the president of the Club's board of directors.

¶3 In 2002, the Club again hired Beretta as its manager. Pursuant to an oral agreement, Beretta was to earn $40,000 per year and receive two weeks of vacation. In October 2003, Beretta presented a proposed written contract to the Club's board of directors. The board rejected that contract at its November meeting but then drafted a counterproposal to Beretta's proposed contract. The board approved the counterproposal in January 2004, and the board's president, Leroy Bachman, agreed to deliver it to Beretta for her signature. The contract provided places for both Bachman and Beretta to sign, and Bachman signed on the appropriate line.

¶4 At the board meeting in February 2004, Beretta discussed certain terms of the contract that concerned her and agreed to submit proposed changes at an upcoming board meeting. The contract remained on the board's agenda until June or July 2004 when Beretta asked the board to remove it from the agenda. At no point during the intervening months had she submitted proposed changes to the board. She eventually signed the contract that Bachman had delivered to her, but it also bore handwritten notes by Beretta reflecting the concerns she had discussed with the board in February. She did not present the signed

contract to the board or inform anyone that she had executed the agreement Bachman had signed.

¶5 In the spring of 2005, the Club hired a bookkeeping firm. Because it no longer required bookkeeping duties of Beretta, the board voted to reduce her salary by $15,000. Then, in early May, the board terminated Beretta as club manager, choosing to distribute her job responsibilities among other employees. On May 27, 2005, Beretta's attorney notified the Club of Beretta's claim that she had had a written employment contract and included a photocopy of the contract Beretta had signed but never delivered.

¶6 Thereafter, Beretta filed suit against the Club, the parties took depositions of Beretta and Bachman, and the Club moved for summary judgment. After briefing, the trial court granted the Club's motion, agreeing with the Club that Beretta had failed to accept the Club's written offer of employment. Beretta filed a motion for reconsideration or alternatively a new trial, arguing the trial court erred in dismissing her entire complaint because the Club had not moved for summary judgment on all counts. She also contended the trial court erred because she had raised genuine issues of material fact about whether an enforceable contract existed between herself and the Club. In support, Beretta attached her own affidavit in which she asserted, for the first time, that Bachman had seen her sign the contract. The trial court denied the motion, reiterating its earlier ruling that Beretta had not accepted the contract and explaining that, without a valid contract, "[n]o grounds exist[ed] to pursue any of plaintiff's claims." This appeal followed.

¶7 Beretta raises the same arguments on appeal, specifically contending she and the Club had intended to enter a contractual agreement and she had accepted its offer by signing the agreement, by performing her duties under the contract, or simply by not rejecting the offer.[1] Furthermore, she maintains any of those methods constituted acceptance of the contract because the Club never withdrew or revoked its offer.

¶8 We review de novo whether a trial court properly granted summary judgment. *Phoenix Baptist Hosp. & Med. Ctr., Inc. v. Aiken*, 179 Ariz. 289, 292, 877 P.2d 1345, 1348 (App. 1994). We will affirm summary judgment only when "the facts produced in support of the claim or defense have so little probative value, given the quantum of evidence required, that reasonable people could not agree with the conclusion advanced by the proponent of the claim or defense." *Orme Sch. v. Reeves*, 166 Ariz. 301, 309, 802 P.2d 1000, 1008 (1990); *see also Lasley v. Helms*, 179 Ariz. 589, 591, 880 P.2d 1135, 1137 (App. 1994).

¶9 In Arizona, employees work at the will of their employer unless "both . . . have signed a written contract to the contrary." A.R.S. § 23-1501(2).

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[1]Beretta also asserts she relied on previous employment contracts with the Club, but does not articulate how that created a valid, enforceable contract in this instance. Her contention that her past relationship with the Club allowed her to amend a written contract when changes needed to be made does not prove that she later accepted the new contract the Club offered her in 2004. If anything, evidence of a past signed employment agreement and signed amendments further supports the trial court's finding that she could only have accepted this offer by signing the contract and delivering it to the board. Regardless, because she does not justify her position with any legal authority, we need not consider it. *See In re 1996 Nissan Sentra*, 201 Ariz. 114, ¶ 15, 32 P.3d 39, 43-44 (App. 2001).

> Both the employee and the employer must sign this written contract, or this written contract must be set forth in the employment handbook or manual or any similar document distributed to the employee . . . , or this written contract must be set forth in a writing signed by the party to be charged.

Id. In determining whether an agreement rises to the level of a written contract under § 23-1501, "we apply common law principles of contract interpretation and attempt to determine and give effect to the parties' intent." *Johnson v. Hispanic Broadcasters of Tucson, Inc.*, 196 Ariz. 597, ¶ 5, 2 P.3d 687, 689 (App. 2000).

¶10 The Club argues Beretta did not unequivocally manifest her intent to accept the terms of the written employment contract it offered her.[2] "For an enforceable contract to exist, there must be an offer, acceptance, and consideration." *Tabler v. Indus. Comm'n*, 202 Ariz. 518, ¶ 8, 47 P.3d 1156, 1158 (App. 2002). Mutual consent to a contract can only exist when acceptance of the offer is unequivocal. *Richards v. Simpson*, 111 Ariz. 415, 417, 531 P.2d 538, 540 (1975); *see also* Restatement (Second) of Contracts § 57 (1981) ("Where notification is essential to acceptance by promise, the offeror is not bound by an acceptance in equivocal terms unless he reasonably understands it as an acceptance."). Both parties must intend to be bound by the contract. *See Tabler*, 202 Ariz. 518, ¶¶ 11-12, 47 P.3d at 1159. And a finding of mutual intent "must be based on objective evidence," which may include the surrounding circumstances and conduct of the parties. *Id.* ¶ 13.

[2]Because we agree with the Club, we need not reach the issues of whether Beretta rejected the proposed contract or whether sufficient consideration existed to form a contract.

¶11 Beretta argues that she accepted the Club's offer either by not rejecting it or by performing her job duties as identified in the contract. The trial court correctly concluded, however, that the offer could only have been accepted by Beretta's signing the contract and delivering it to the board. Acceptance of an offer is a "'manifestation of assent to the terms thereof made by the offeree *in a manner invited or required by the offer*.'" *Contempo Const. Co. v. Mountain States Tel. & Tel. Co.*, 153 Ariz. 279, 281, 736 P.2d 13, 15 (App. 1987), *quoting* Restatement § 50 (emphasis added). If an offer invites or requires acceptance by signing, it will only become a binding contract when it is signed *and* delivered. *See Am. Family Mut. Ins. Co. v. Zavala*, 302 F. Supp. 2d 1108, 1117 (D. Ariz. 2003); *Brown v. First Nat'l Bank*, 44 Ariz. 189, 192, 36 P.2d 174, 175 (1934); *see also State v. Mecham*, 173 Ariz. 474, 479, 844 P.2d 641, 646 (App. 1992) (delivery of fund that was subject of settlement agreement constituted acceptance of offer to compromise). Here, the Club invited Beretta to accept its offer by signing the proposed contract, which provided places for both parties to sign. And, as reflected in the minutes of the meeting at which the board agreed to offer the contract to Beretta, the board members also agreed that Bachman would deliver it to her for signature. Thus, based on the only reasonable interpretation of the facts before it, the trial court did not err when it concluded that Beretta did not have an option to accept the contract by any method other than signing and delivering it.

¶12 The trial court also correctly concluded that Beretta failed to demonstrate a genuine question of material fact about whether she had "accepted the written offer either

by signing or by informing anyone on the board that she had accepted the written offer." Even though Beretta avowed she had signed the contract offered her, she could not recall when she signed it. She presented her concerns about the proposed contract to the board in February 2004, and the item remained on the board's agenda through June or July 2004 while the board waited for Beretta to propose the changes she sought. She admitted she did not deliver a signed copy of the contract to the board, nor did she remember ever informing the board that she had signed it. Viewing the evidence in the light most favorable to Beretta, her conduct did not communicate to the board her unequivocal acceptance of its offer nor her intent to be bound by the contract offered her.

¶13 Even if Beretta signed the contract immediately after the January 2004 meeting, she did not contend during the summary judgment proceedings that she had delivered her acceptance to the board prior to May 2005. Once the board reduced her duties and salary and then terminated her position, it clearly had withdrawn its offer, and nothing remained for Beretta to accept. *See Butler v. Wehrley*, 5 Ariz. App. 228, 232, 425 P.2d 130, 134 (1967) (revocation of offer communicated when offeror acts inconsistently with terms of offer).

¶14 In an affidavit attached to her motion for reconsideration or new trial, Beretta avowed she had signed the contract in front of Bachman in 2004, a fact she had not previously asserted. That avowal might well have created a question for a jury on whether Beretta's memory was accurate and, if so, whether signing the contract in front of Bachman

constituted both signing and delivering the contract. But the trial court declined to consider her affidavit in ruling on the motion for reconsideration, which the court had discretion to do. *See Phil W. Morris Co. v. Schwartz*, 138 Ariz. 90, 94, 673 P.2d 28, 32 (App. 1983) (trial court did not abuse its discretion in rejecting affidavits submitted after entry of summary judgment when party did not assert grounds for new trial). Even if the court had considered Beretta's untimely affidavit, the court was entitled to disregard its content because the affidavit contradicted Beretta's earlier deposition testimony that she had not informed anyone on the board that she had accepted its offer. *See Wright v. Hills*, 161 Ariz. 583, 588, 780 P.2d 416, 421 (App. 1989) (holding "parties cannot thwart the purposes of Rule 56[, Ariz. R. Civ. P., 16 A.R.S., Pt. 2] by creating issues of fact through affidavits that contradict their own depositions"), *overruled on other grounds by James, Cooke & Hobson, Inc. v. Lake Havasu Plumbing & Fire Prot.*, 177 Ariz. 316, 868 P.2d 329 (App. 1993). Without Beretta's belated factual claim, no reasonable juror could conclude on the facts presented that Beretta had either intended to be bound by the contract or had unequivocally accepted the Club's offer by signing it. Thus, the alleged contract on which all of Beretta's claims are predicated was never actually formed, and the trial court properly dismissed the complaint.[3]

[3]Beretta argues the trial court erred in dismissing count four of her complaint because the Club did not mention that count in its motion for summary judgment. However, the Club clearly requested dismissal of the entire complaint and showed that Beretta had not presented evidence of the existence of the valid contract on which all of her claims hinged, including her statutory claim for wages in count four. Thus, we need not address this

¶15 For the foregoing reasons, we affirm the trial court's entry of summary judgment and grant the Club's request for attorney fees pursuant to A.R.S. § 12-341.01(A) upon its compliance with Rule 21, Ariz. R. Civ. App. P., 17B A.R.S. *See Mullins v. S. Pac. Transp. Co.*, 174 Ariz. 540, 543, 851 P.2d 839, 842 (App. 1992).

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PETER J. ECKERSTROM, Presiding Judge

CONCURRING:

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PHILIP G. ESPINOSA, Judge

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GARYE L. VÁSQUEZ, Judge

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argument further.